Teoh Chuan Aik & Anor v Wafong Credit Sdn Bhd & Anor

HIGH COURT (TAIPING) — CIVIL SUIT NO AB-22NCvC-17–04 OF 2021
NOOR RUWENA JC
16 JUNE 2024

Civil Procedure — Preliminary objection ('PO') — Objection to law firm representing party in suit — Law firm sued as co-defendant acted for itself in suit — Plaintiff filed PO urging court to bar law firm from so acting so that Legal Profession (Practice and Etiquette) Rules 1978 was not breached — Whether PO was abuse of court's process as it sought to deny co-defendant of solicitor/counsel of its choice — Whether apart from one partner in firm who had been named in the pleadings and might possibly be called as a witness, the firm and its other lawyers could act for the firm in the suit

The plaintiffs, who were husband and wife, had charged their properties to the first defendant ('D1') to secure a RM1.2m loan. The second defendant ('D2') in the suit herein was the law firm of Messrs BH Koh, Soong, Zarin & Partners which had prepared the loan agreements. In the suit, the plaintiffs claimed that there were several irregularities concerning the loan agreements which breached the law. A few days before the trial of the suit, the plaintiffs, by way of letter, raised a preliminary objection ('PO') that the court should disallow Messrs BH Koh, Soong, Zarin & Partners from acting for D2 to avoid any breach of the Legal Profession (Practice and Etiquette) Rules 1978 ('the Rules') which, inter alia, provided that an advocate and solicitor shall not act for a party if he/she had a pecuniary interest in the suit or might be called as a witness at the trial.

Held, dismissing the PO:

(1) The PO was an abuse of the court's process as it was intended to deprive D2 of its right to counsel of its choice. The court found the PO not proven on balance of probabilities. The lawyers in the legal firm of D2 — other than one of its partners, Andrew Soong, who had been named in the pleadings — should not be disqualified from acting for D2 in this suit. By virtue of the 1978 Rules, it was advisable for Andrew Soong not to represent D2 in the suit as he might be embarrassed in the course of the trial (see para 22).

[Bahasa Malaysia summary

Plaintif, yang merupakan suami dan isteri, telah menggadaikan hartanah mereka kepada defendan pertama ('D1') untuk mendapatkan pinjaman

berjumlah RM1.2 juta. Defendan kedua ('D2') dalam tindakan tersebut adalah sebuah firma guaman Tetuan BH Koh, Soong, Zarin & Partners yang telah menyediakan perjanjian pinjaman. Dalam tindakan tersbut, plaintif mendakwa terdapat beberapa ketidakaturan berhubung perjanjian pinjaman yang melanggar undang-undang. Beberapa hari sebelum perbicaraan tindakan tersebut, plaintif, melalui surat, membangkitkan bantahan awal ('PO') bahawa mahkamah tidak seharusnya membenarkan Tetuan BH Koh, Soong, Zarin & Partners daripada bertindak untuk D2 bagi mengelakkan sebarang pelanggaran Kaedah-Kaedah Profesion Undang-Undang (Amalan dan Etiket) 1978 ('Kaedah tersebut') yang, antara lain, memperuntukkan bahawa seorang peguambela dan peguamcara tidak boleh bertindak untuk sesuatu pihak jika dia mempunyai kepentingan kewangan dalam tindakan tersebut atau boleh dipanggil sebagai saksi dalam perbicaraan.

Diputuskan, menolak PO:

(1) PO tersebut adalah penyalahgunaan proses mahkamah kerana ia bertujuan untuk melucutkanhak D2 untuk mendapatkan peguam pilihannya. Mahkamah mendapati PO tidak dibuktikan atas imbangan kebarangkalian. Peguam dalam firma guaman D2 — selain daripada salah seorang rakan kongsinya, Andrew Soong, yang telah dinamakan dalam pliding — tidak sepatutnya hilang kelayakan daripada mewakili D2 dalam tindakan ini. Berdasarkan Kaedah 1978, Andrew Soong dinasihatkan untuk tidak mewakili D2 dalam tindakan tersebut kerana beliau mungkin dimalukan sepanjang perbicaraan (lihat perenggan 22).]

Cases referred to

Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals [2015] 1 MLJ 773; [2015] 1 MLRA 107, FC (refd)

Messrs Roland Cheng & Co (suing as a firm) v Elizabeth Ng Yuk Lee [2022] MLJU 2513; [2022] MLRHU 2133, HC (consd)

Perak Hanjoong Simen Sdn Bhd v Perindustrian Tenaga Mix Sdn Bhd [2008] 8 MLJ 567, HC (refd)

Taylor v Attorney-General [1975] 2 NZLR 675, CA (refd)

Vijayalakshmi Devi Nadchatiram v Saraswathy Devi Nadchatiram [2000] MLJU 838, FC (folld)

Wee Choo Keong v Pendakwa Raya [1990] 2 MLJ 239, HC (refd)

Legislation referred to

Legal Profession Act 1976

Legal Profession Rules (Practice and Etiquette) 1978 rr 3, 5, 27, 28, 31

Moneylenders Act 1951

Rules of Court 2012 O 92 r 4

Gurbachan Singh a/l Bagawan Singh (Sandeep Gobindeep & Co) for the plaintiff.
Lim Ta Wai (with Mohammed Azmi bin Shahruddin) (Khong & Son); Cheong Yau Kheong (with Siti Aishah bt Mohamed Azahari) (BH Koh, Soong, Zarin & Partners) for the defendants.

Noor Ruwena JC:

BACKGROUND

[1] The parties herein will be referred to as they are at the High Court. A notice of appeal to the Court of Appeal was filed by Messrs Sandeep, Gobindeep & Co on 3 May 2024 on behalf of the plaintiffs against the decision of this court dated 3 April 2024. The decision was in respect of a preliminary objection ('the PO') by the plaintiffs in encl 79 of this civil suit. I now give my reasons for dismissing the PO in this grounds of judgment.

[2] The PO in encl 79 was a letter dated 28 March 2024 that was filed rather late, ie a few days before the trial of this suit was supposed to commence. The trial dates were set for 1–4 April 2024. The letter stated that the plaintiffs objected to Messrs BH Koh, Soong, Zarin & Partners acting as solicitors for the second defendant in the suit who happened to be the same law firm. It was the plaintiffs' contention that Messrs BH Koh, Soong, Zarin & Partners cannot represent itself in breach of the Legal Profession Act 1976 and Legal Profession Rules (Practice and Etiquette) 1978 in particular rr 5, 27, 28 and 31.

HEARING ON PRELIMINARY OBJECTION

[3] The plaintiffs are husband and wife, who are registered owners of two properties known as PM 9454 Lot 316630 Mukim Asam Kumbang, Daerah Larut Matang, Negeri Perak and PM 9455 Lot 316631 Mukim Asam Kumbang, Daerah Larut Matang, Negeri Perak ('the properties'). The plaintiffs had entered into two loan agreements with the first defendant totalling RM1.2m and the properties were charged as security for the loans. It was alleged that the first defendant did not comply with the mandatory requirements of the Moneylenders Act 1951 (Act 400) and rules thereunder.

[4] It was also contended in the plaintiffs' statement of claim that the loan agreements were defective wherein certain clauses had been intentionally omitted by the first defendant and the second defendant. It was alleged further that Andrew Soong Tze Toong, a partner of the second defendant who acted for the second defendant, was not appointed by the plaintiffs and that he was a close friend of the first defendant and that they did not know him. Moreover, despite the loan amount stipulated in the loan agreements, the plaintiffs only

A received an amount of RM607,976.40.

[5] During the hearing of the PO on 1 April 2024, the court heard oral submissions by the parties and referred to a few case laws cited by them. The plaintiffs' counsel submitted that Messrs BH Koh, Soong, Zarin & Partners had breached the said Rules because Andrew Soong Tze Toong ('Andrew Soong') and the second defendant had a pecuniary interest in this suit. The plaintiffs' counsel submitted that the plaintiffs and the court did not know if the counsels from the second defendant's firm appearing for the second defendant in the suit had pecuniary interest in the matter or if they would be appearing as witnesses. Therefore, it was contended that it was questionable if the counsels from the second defendant would be able to uphold the dignity of the profession since they would defend their own firm and partner at all costs.

[6] The PO was intended to remove the second defendant's firm from acting for the second defendant as there was no guarantee that the second defendant's counsels were independent and that they would not be prejudiced if the PO was upheld by the court. Hence, the issue of 'pecuniary interest' of the second defendant in this suit must be taken into consideration by the court to allow the PO.

[7] The plaintiffs' counsel submitted that the Federal court decision in the case of *Vijayalakshmi Devi Nadchatiram v Saraswathy Devi Nadchatiram* [2000] MLJU 838 applied to the present case as it was still good law and had not been overruled. It was argued that the second defendant should be represented by another law firm as the counsel who appeared for the second defendant in the PO could not be independent when the suit involved his partner, Andrew Soong. The court was also referred to the case of *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773; [2015] 1 MLRA 107 which was a case where learned counsel for the plaintiffs and his law firm were litigants in the said case. The pertinent fact in that case was that the counsel (first appellant) and his law firm (second appellant) were represented by another law firm in the suit. Therefore, this court was urged that it was the only way to proceed ie that the second defendant appoint another law firm to represent it.

[8] The counsel for the second defendant submitted in reply that the PO was defective as the letter was not served upon the second defendant by giving them four clear working days' notice in accordance with r 11.04 of the Rules and Rulings of the Bar Council 2015. Nevertheless, counsel for the second defendant proceeded to submit on the merits of the PO. It was argued that the PO should be dismissed by the court because Andrew Soong was not appearing

as a counsel to defend the suit and that the lead counsel, Cheong Yau Kheong was allowed by law to represent his firm, the second defendant. Counsel relied on the decision in the case of *Messrs Roland Cheng & Co (suing as a firm) v Elizabeth Ng Yuk Lee* [2022] MLJU 2513; [2022] MLRHU 2133 and stated that here, there was no solicitor-client relationship being disputed. That was the situation in the case of *Vijayalakshmi Devi Nadchatiram* and therefore, the Federal Court decision was not applicable to the present case and neither was this court bound to rule that the second defendant could not be represented by counsel of its choice. Rule 27 was not applicable in the present case.

[9] In reply, this court was urged by the plaintiffs' counsel that the law firm was akin to a company which was being sued and that a company cannot act in person. Hence, if the second defendant is allowed to represent itself, learned counsel submitted that the decision in *Vijayalakshmi Devi Nadchatiram* will be of no value.

[10] Foremost is r 3 of the Legal Profession (Practice and Etiquette) Rules 1978 ('the Practice and Etiquette Rules') which provides:

> 3(a) An advocate and solicitor shall not accept a brief if he is or would be embarrassed.
>
> (b) An embarrassment arises:
>
> (i) ...
>
> (ii) where there is some personal relationship between him and a party or a witness in the proceedings.

[11] Rules 27 and 28 state:

> Rule 27 Advocate and solicitor not to appear where pecuniarily interested
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> (a) An advocate and solicitor shall not appear in any matter in which he is directly pecuniarily interested.
>
> (b) This rule does not apply to the case of an advocate and solicitor appearing himself to tax his own costs.
>
> Rule 28 Advocate and solicitor not to appear in a case where he is a witness
>
> (a) An advocate and solicitor shall not appear in Court or in Chambers in any case in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact, and if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardising his client's interests.
>
> (b) An advocate and solicitor shall not appear before an appellate tribunal if in the case under appeal he has been a witness on a material and disputed question of fact in the Court below.

(c) These rule does not prevent an advocate and solicitor from swearing or affirming an affidavit as to formal or undisputed facts in matters in which he acts or appears.

[12] As there was no notice of application on this matter and only a PO letter, the court relied on the case laws cited and on research as well as the pleadings filed in order to ascertain whether there was basis for the PO made very late by the plaintiffs', ie just a few days before the trial was supposed to commence and not during the PTCM stage when quite a number of case management session had been conducted with me.

[13] Nevertheless, I will go on to consider some of these cases which this court viewed warranted some explanation. The Federal Court held in *Vijayalakshmi Devi Nadchatiram* that:

> *Having considered this appeal before us on the question so framed, we are of the firm view that having regard to the personal relationship of the respondent to those whom she is or was representing and the pecuniary interest she is alleged to have in those matters, though they were subject to their being litigated in open court, the subject matter of which we express no opinion either way, we are of the firm view that the respondent is prohibited from acting for those persons in view of her personal relationship and of her pecuniary interest by reasons of rr 3 and 27(a) of the Legal Profession (Practice and Etiquette) Rules 1978.*
>
> In saying so we are of the view the Court of Appeal, in their decision to allow the appeal had erred. The Court of Appeal with respect, erred in not focussing their attention to an elementary tenet of construction in finding the meaning of 'personal relationship' and 'pecuniary interest'. Their approach should have been to ask the relevant question, which was, what is the purpose of the rr 3 and 27(a)? We cite s 17A of the Interpretation Acts 1948 and 1967:
>
> > 17A Regard to be had to the purpose of Act
> >
> > In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.
>
> The Court of Appeal would have found the answer. The objective of the provision lies in the fact that the Bar had set a high standard of practice. The Bar requires that an advocate and solicitor must be able to give an objective and independent judgment before he embarks on the task of advising a client. *Thus the advocate and solicitor would not be in a position to do so if he is bound by ties of personal relationship to his client and tied by pecuniary interest. The mischief to be cured and the intention of the Rules are too clear to be ignored. The provision are too clear to admit of any doubt or dispute. They had been so framed to preserve the integrity of an advocate and solicitor so that he may not be in conflict of interest and by the same token ensures that when he acts for a client he is independent and free vis a vis both when representing the client and performing his duty as an officer of the court in which he appeared.*

In this regard we would apply the decision of *Black v Taylor* [1993] 3 NZLR 403 where the Court of Appeal in New Zealand held that 'the court may prevent a barrister acting as counsel in a matter which he had a conflict of interest, or in which he appeared to have a conflict of interest such that justice would not be seen to be done. (Emphasis added.)

[14] On the facts of the *Vijayalakshmi Devi Nadchatiram* it was very clear to this court that the case could be distinguished on the facts. Meanwhile, the case of *Messrs Roland Cheng* referred to by the second defendant, although was a High Court decision, I found it to be of some guidance to this court in order to arrive at a proper and just decision on this PO. The relevant parts of the High Court decision are reproduced below as follows:

[20] As Mr Roland Cheng is in effect, a de facto litigant representing himself in the Magistrates' Court Suit, rr 27 and 28 is not applicable. In *M/s Thomas, Shankar Ram & Co Advocates v Jeffrey Law Siew & Ors* [2009] 5 MLRH 109; [2010] 10 CLJ 350, the High Court per Rhodzariah bt Bujang JC (as Her Ladyship then was) held:

> Yet, there is a distinguishing feature in the cases cited by them which is so apparent in this case - it is that the advocates here, being the only partners in the plaintiff firm, are themselves the de facto litigants unlike in the cited cases where they were acting for the litigants.
>
> The nature of the plaintiff's claim in this case is such that the partners themselves need to depose the affidavits as this action concerns matters pertaining to their rights and duties as counsels in the suit action and the related appeals and the analogy drawn by Mr Shankar Ram with respect to a lay person acting for himself is, in my view, appropriately made. However, after some consideration I am of the view that r 27(2) cited by Mr Shankar Ram is not applicable to their case — that Rule is specifically meant for a taxation proceeding where an advocate has presented his bill of cost to be taxed by the court and is not meant to cover just any case where cost is an issue or a subject matter of dispute. *However, I am certain that r 27(1) which says that an advocate shall not appear in any matter in which he is directly pecuniarily interested refers to actions filed by others in which he is so related — not to one where he is sued or being sued in person (or as a partner of a firm as in this case). Similarly with r 28(1). It is also to prevent an advocate to act or to continue acting for his client if he knows that his possession of material and disputed facts is such that it will make him a potential witness in the case.*

[23] In fact, the right of an advocate to represent himself and to be a witness is expressly recognised in r 30(a) of the 1988 Rules which provides that 'An advocate who appears in person as a party or who is in the witness box shall not wear robes'. Thus, under r 30(a), Mr Roland Cheng could not wear robes if he appears as a litigant in open court. In the present case, Mr Roland Cheng has elected to conduct his own case and is not appearing as counsel for another party. Hence, r 27 and r 28 does not apply to the present case and does not preclude Mr Roland Cheng from acting for himself and/or his law firm in the magistrates' court suit. Further, the

right to sue in person is clearly and expressly provided for in O 5 r 6 of the ROC 2012. (Emphasis added.)

[15] From the pleadings filed, the court was able to gauge the role of Andrew Soong in the transactions alleged by the plaintiffs and suffice to say, he should not act as counsel to represent the second defendant to defend itself in the suit. I noted that in many case laws on the issue of rr 27 and 28 refer to situations where there arose a conflict of interest because the counsel had acted for one party and then at the next stage acted for the opposing party, including the case of *Gurbachan Singh* where the Federal Court dismissed the appellants' appeal. But the general principle is that if there is a personal interest, then only the counsel alleged to be pecuniarily interested would be disqualified from representing himself and/or the law firm. As stated above, in *Vijayalakshmi Devi Nadchatiram* the facts could be distinguished from the facts in the present case. Nevertheless, if the court is wrong on this issue, the court had considered the principle in that case as below.

[16] The leave question to be answered by the Federal Court in *Vijayalakshmi Devi Nadchatiram* were:

> Whether the Court of Appeal was correct in law in their interpretation of the proper construction for rr 3 and 27(a) of the Legal Profession (Practice & Etiquette) Rules 1978 and their application of the same against the respondent, in particular:
>
> (a) the proper construction and meaning of the words 'personal relationship' within r 3 of the Legal Profession (Practice and Etiquette) Rules 1978; and
>
> (b) the proper construction and meaning of the words 'directly pecuniarily interested' within r 27(a) of the Legal Profession (Practice and Etiquette) Rules 1978.

[17] The Federal Court held that 'having regard to the personal relationship of the respondent to those whom she is or was representing and the pecuniary interest she is alleged to have in those matters, we are of the firm view that the respondent is prohibited from acting for those persons in view of her personal relationship and of her pecuniary interest by reasons of rr 3 and 27(a)'. The Federal Court stated further that the Bar requires that 'an advocate and solicitor must be able to give an objective and independent judgment before he embarks on the task of advising a client. Thus, the advocate and solicitor would not be in a position to do so if he is bound by ties of personal relationship to his client and tied by pecuniary interest'. The facts in that case showed that the respondent and appellants were clearly siblings. The Federal Court held:

> Clearly the respondent has a personal relationship to the defendant. Counsel submitted in Action No 4 at p 220 para 10.1 of the record of appeal, the pleadings (writ at p 527 of the record of appeal) disclosed that the plaintiff therein is the daughter of the appellant and niece of the respondent. The plaintiff therein is suing

both the mother and father as second defendant and third defendant who are the appellants. The respondent is under a personal relationship without any dispute.

...

As for the meaning of pecuniary interest, counsel cited to us the case of *Haji Abdul Ghani bin Ishak & Anor v Public Prosecutor* [1981] 2 MLJ 230 where at p 235 where Wan Yahya J (as he then was) after discussing other relevant authorities said:

> In my view any interest relating to money or money's worth, any interest that could be converted into money, or any interest the object of which is to make money falls in the category of pecuniary interest.

...

That being our decision, we would answer the question framed that the Court of Appeal with respect, had erred in law in the interpretation of the proper construction of rr 3 and 27(a) of the Legal Profession (Practice & Etiquette) Rules 1978 and the application of the same against the respondent. That being our decision we allow the appeal and restore the decision of the High Court Seremban dated 23 March 1996 that the respondent be so restrained in all actions except No 4 with costs here and below. Deposit shall be refunded to the appellant.

[18] Applying the principles in that case to the present case, bearing in mind that Andrew Soong being a partner of the firm, the court found that he did not have the kind of personal relationship envisaged in *Vijayalakshmi Devi Nadchatiram* with the plaintiffs. Having said that, the court did not find that the second defendant firm would be embarrassed as stated in r 3 because there was nothing in the pleadings which implicated others in the firm. Moreover, this court opined that when counsel asks a question in cross-examination to a witness at the trial later, he would already know the answer and that is the general principle in advocacy; otherwise one would be going on a fishing expedition.

[19] It is trite that the right of a particular individual to be represented by an advocate and solicitor of his own choice is not absolute. It is the court that will determine that right. Referring to O 92 r 4 of the Rules of Court 2012, the Rules do not limit the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court. This power must be used judiciously when the need arises, such as in the present case. It is exercised where it is just and equitable to do so, to ensure the observance of the due process of law, and to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them: *Taylor v Attorney-General* [1975] 2 NZLR 675 (Malaysian Civil Procedure 2021 at p 1339).

[20] Andrew Soong did not argue for the second defendant on 1 April 2024 and in fact he was also not robed nor seated at the Bar during the submissions

on the PO. This court referred to the judgment of Wan Yahya J (as His Lordship then was) in *Wee Choo Keong v Pendakwa Raya* [1990] 2 MLJ 239 where His Lordship interpreted r 28 of the Practice and Etiquette Rules 1978 and stated:

> This section to my mind does not envisage that an advocate and solicitor is *ipso facto* excluded from appearing as such in court the moment he believes that he will be a witness. That ethical restriction will only arise if he is likely to be a witness of any material or disputed fact. Rule 28 is a rule of ethics and the magistrate should not have applied it totally with the stringency of the force of law.

[21] In the case of *Perak Hanjoong Simen Sdn Bhd v Perindustrian Tenaga Mix Sdn Bhd* [2008] 8 MLJ 567, the court stated that the lawyer's role in the settlement agreement would in all probability potentially make him a witness of material and disputed question of facts. The court held that 'As a sole proprietor he could not defend himself on the basis of *In re A Firm of Solicitors* [1996] 3 WLR 16 as in no position to testify that no confidential information had passed to him in the same way the solicitor did in that case (see paras 15 & 17)'.

[22] The court found that the plaintiffs' PO had not been proved on a balance of probabilities, that the counsels of the second defendant should be disqualified from handling the case, other than Andrew Soong who had been named in the statement of claim and reply to second defendant's defence. But by virtue of the 1978 Rules, it is not adviseable for Andrew Soong to represent the second defendant in the suit as he may be embarrassed in the course of the trial. The court invoked its inherent power in making this ruling power to prevent an abuse of the court process which was intended to deprive the second defendant their right to the counsel of their choice.

CONCLUSION

[23] Premised on the above considerations, the plaintiffs' PO was dismissed with no order as to costs.

Preliminary objection dismissed without order as to costs.

Reported by Ashok Kumar